(17)

FILED
JUL 21 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO. 246

JOSEPH J. KOPKE and HENRY HLAVACEK,
PETITIONERS,

vs.

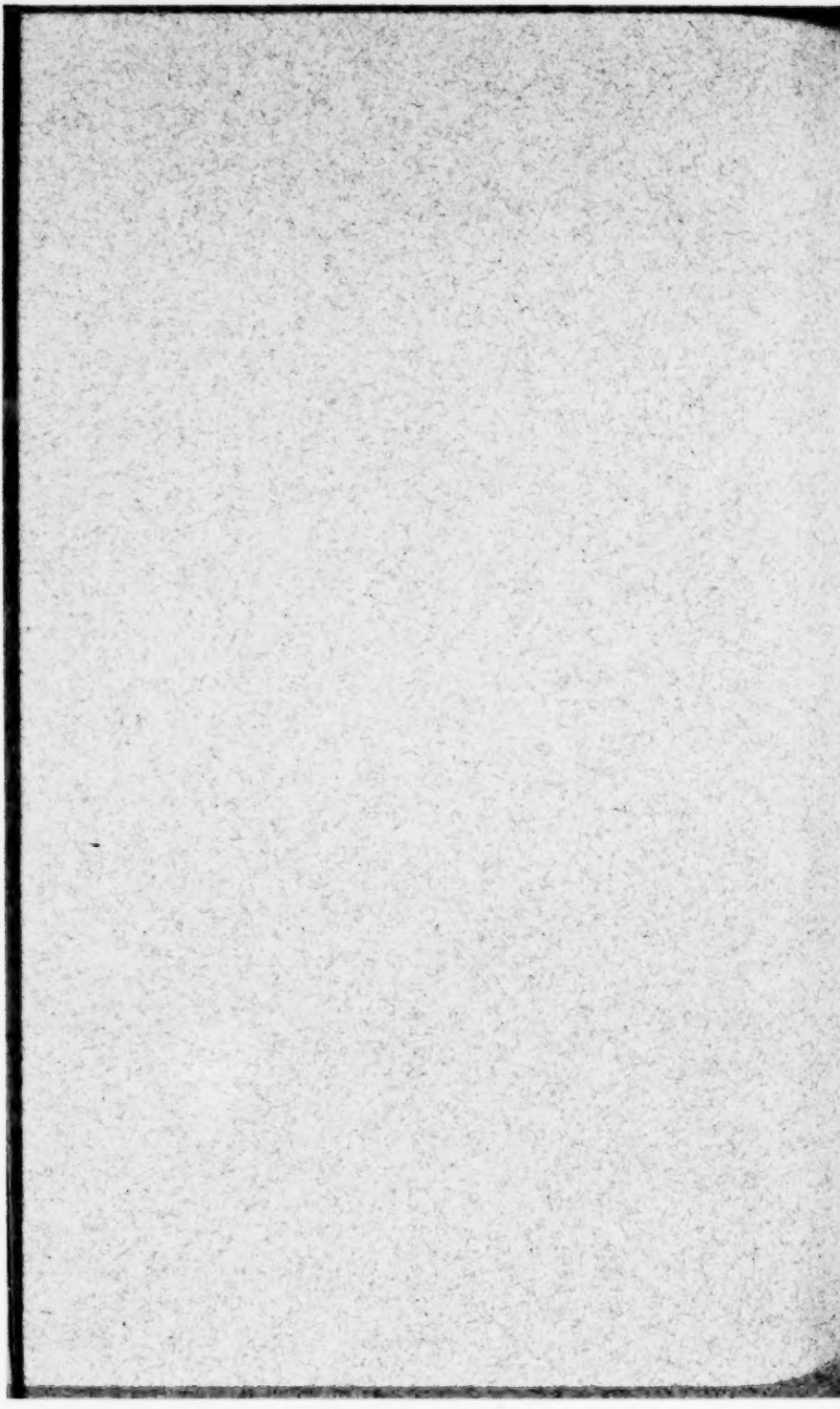
PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Counsel for Respondent.

THOMAS J. COURTNEY,
State's Attorney of Cook County, Illinois,
Of Counsel.

14 (1377—60)



SUBJECT INDEX

PAGE NO.

Statement of the case 1

Argument 8

Point A—The petitioners were proven guilty of the crime as charged in the indictment beyond a reasonable doubt 9

Point B—The counts in the indictment were properly joined and no incompetent or prejudicial testimony was introduced into evidence 11

Point C—The petitioners were given a fair and impartial trial and were not deprived of any state or federal constitutional rights.

Conclusion 13

TABLE OF CASES CITED

PAGE No.

Carpenter v. People, 31 Colo. 284; 72 Pac. 1072.....10
Coate v. Commonwealth, 176 Ky. 427; 195 S. W. 1080.. 9
Cole v. State, 62 Tex. Crim. 270; 138 S. W. 109..... 9
Crosby v. People, 137 Ill. 325.....10
Neblett v. State, 47 Tex. Crim. 573; 85 S. W. 813.....10
People v. Sailor, 319 Ill. 205..... 9
People v. Sheldon, 54 Mont. 189; 169 Pac. 37..... 9
People v. Superior Court, 234 Ill. 186..... 8
U. S. v. Scroggins, Fed. case No. 16243.....10

TEXT BOOKS CITED

4 Blackstone's Commentary, 205..... 9
1 Hawkins Plea of Crown, 175..... 9

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

NO.

JOSEPH J. KOPKE and HENRY HLAVACEK,
PETITIONERS.

vs.

PEOPLE OF THE STATE OF ILLINOIS, RESPONDENT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

MAY IT PLEASE THE COURT:

Under Point III of their brief, the petitioners make their statement of the case, setting forth just such facts

as appear to be most beneficial to their case. We therefore ask leave to submit a complete statement of the facts in the case.

The complaining witness, Czeslaw Louis Mikolajczyk (Abst. 12), of 3036 West Cullerton Street, who had been a butcher for the past thirty-three years, had joined the Butchers' Union in 1928 and received a withdrawal card from the union in August, 1938. On January 6, 1940 he was working in John's Quality Market at 3708 West 26th Street, cleaning pipes in the ice box in the rear of the butcher shop, when he saw the defendants Hlavacek and Kopke enter the room. Kopke said, "What are you doing here", and Hlavacek said, "Come out, you son-of-a-bitch", and that Kopke then pulled out a gun and pointed it at him and then kicked him between the legs, which he indicated to the jury is that region of the penis and testicles (Abst. 14). He shouted for help and police and then slumped down on a chair in the vestibule by the telephone. When he got up to get his coat Kopke hit him with a revolver on the left side of the cheek, which knocked him down right in front of the vestibule door and caused him to bleed from the nose and month. Thereupon Hlavacek stood over him and shook some letters (alleged to have been written by Mikolajczyk) in his face. There were about 12 or 15 ladies in the butcher shop at the time and one of them shouted, "Don't kill

the man, what's the matter." Mikolajczyk then got up and got his coat and left the place, going directly to Dr. Charles August Chval's office, about a half block from the butcher shop. The doctor told him to remove his trousers and then examined his testicles and administered first aid to the cut on his face and the inside of his cheek. The doctor gave him a letter to the Lawndale Avenue Police Station and he went from the doctor's office to the police station, where he talked to the police officers in Polish. While he was there Kopke and Hlavacek were brought into the station.

Dr. Charles August Chval (Abst. 28) testified that Mr. Mikolajczyk came to his office on January 6 between 12 and 1 o'clock. He observed that his face was bloody and also his hands, and that the left corner of his lip was lacerated, and when he looked into his mouth his left cheek was also lacerated and bleeding. He assisted him in taking off his clothes and observed that his testicles were enlarged and swollen. He palpitated and on palpitation Mikolajczyk expressed pain. He checked the hemorrhage in the cheek and prescribed treatment for the testicles and abdomen. He again examined the defendant the next Sunday at his home and found the same condition prevailing in the abdomen and testicles as the day before and that his mouth was still sore from the laceration. On his third visit to Mikolajczyk he made a test and found occult blood in the urine.

Aldridge Drahotusky (Abst. 33) testified that he had been a butcher for about five years and that on the morning of January 6, 1940 he was employed and working in the shop of John Matousek at 3708 West 26th Street; he said that he saw Mikolajczyk working in the store on this day but that he did not work behind the counter or handle or sell meat. He stated he saw the defendants Kopke and Hlavacek come into the store at about noon on that date and go into the back room. He then heard a lot of hollering and heard Mikolajczyk call out for help twice and then saw Mikolajczyk come running from the back room where he heard him say, "They are beating me", and fall on the floor next to him, and that he then saw Kopke draw his hand back into his coat pocket. He observed that Mikolajczyk was bleeding from the mouth and he asked Kopke if he had hit him, to which Kopke replied, "No, he is just making out."

John Matousek (Abst. 40), one of the owners of the butcher shop located at 3708 West 26th Street, testified that Mikolajczyk came into his store on January 6 and that he told him to finish cleaning the ice box, for which he would fix him some meat to take home. He stated that Mikolajczyk did not sell meat in the shop that day. He saw Kopke and Hlavacek come into the store that morning at about 11 or 12 o'clock and go into the back room and shortly thereafter he heard Mikolajczyk

hollering for help. He then went into the back room and observed that Mikolajczyk was bleeding from the mouth and that Kopke and Hlavacek were there at the time.

Mary Melchiar (Abst. 43) testified that she was in John Matousek's butcher shop on January 6, 1940 and saw the defendants Kopke and Hlavacek come into the store and go into the back room and that thereafter she heard raised voices as though in argument and saw Mikolajczyk come running from the back room, saying they were hitting him, and she observed that he was doubled up and had his hands in front of him and that he fell on his knees as he came out of the door. She saw Kopke and Hlavacek come after him and heard one of them say, "This is a scab shop. These men should take their aprons off and go home." She thereupon said to Kopke, why don't they leave the poor man earn his living and that Kopke told her to keep her "trap" shut.

Richard Dusek (Abst. 46), the other owner of the butcher shop, testified that he saw the defendants Kopke and Hlavacek come into the shop and go into the back room and shortly thereafter heard Mikolajczyk holler for help and that when he went into the back room he saw Mikolajczyk sitting, holding himself between the legs and that he heard one of the women customers in the store state, "It's a shame to hit a poor man like that", and that he heard Kopke tell her to keep her mouth shut.

Joseph J. Kopke (Abst. 53) testified that on January 6 they received a telephone call that a non-Union man was working at 3708 West 26th Street and that he and Hlavacek then proceeded on foot to this place, which is about three blocks from their office. They entered the shop and on receiving permission went into the back room where they saw Mikolajczyk working at a kettle with water in it. Hlavacek asked him in English, "What are you doing here. Do you have a withdrawal card?" and that Kopke said the same words in Polish; that Mikolajczyk answered he was working. Kopke told Mikolajczyk that he had a withdrawal card and "our men can't work with you". He stated that Mikolajczyk then became angry and turned around and picked up a shovel. Kopke stated he then struck Mikolajczyk and that Mikolajczyk then dropped the shovel and faked a fall over the door sill. He testified that he then said to Hlavacek, "Let's order the boys off the job and get out of here. This is too much acting". As he was leaving the store Mrs. Melchior shouted, "You racketeers! You hoodlums!" and that he said, "Lady, if I were you I would mind my own business. We are not racketeers; we are not hoodlums; we are merely doing our duty." He then left the store and about 3:30 that afternoon he received a message that Captain Maloney of the Lawndale Station wanted to speak to him. He met his associ-

ate in front of the Lawndale Station, where he saw Mikolajczyk and explained the matter to Captain Maloney.

Henry Hlavacek (Abst. 64) corroborated the testimony of Joseph J. Kopke.

Martin Baker (Abst. 81) testified he was Department Physician of the Cook County Hospital X-ray Department and that he examined the X-ray made of the complaining witness and found no apparent pathology in the lumbar sacral spine and that there was no evidence of the traumatic injury to the bones of the spinal column in the lumbar sacral area, which is in the small of the back.

ARGUMENT

The petitioners, on page 7 of their brief, contend that the highest court in the State of Illinois did not pass upon the federal question which they properly raised in the trial court and in their assignment of errors in the Illinois Supreme Court.

We respectfully point out to this Honorable Court that an examination of the opinion of the Supreme Court of Illinois in the instant case will disclose that the federal questions raised under Points A and B in the petitioners' argument were expressly passed upon in that opinion, and further, that all other points raised by the defendants were passed upon in the opinion as follows:

> "Other errors in the trial of the cause are urged to which we have given careful study, but which we do not believe well founded."

In *People* v. *The Superior Court*, 234 Ill. 186, at page 195 the Court said:

> "The general rule is, when a judgment is affirmed by this court all questions raised by assignment of error, and all questions that might have been so raised, are to be regarded as finally adjudicated against the appellant or plaintiff in error. A judgment or decree having been affirmed by this court, must be regarded as free from all error. *Gould* v. *Sternberg*, 128 Ill. 510."

A.

Under heading "A" in their Argument, the petitioners, after quoting various definitions of mayhem from May's Criminal Law, Third Edition, Section 217, page 208, contend that in the case at bar disablement was not accomplished because kicking the complaining witness in the testicles could not have accomplished the crime.

The petitioners support their position by the affidavit of Julius Glasser, not properly a part of the record, and introduced after the verdict in support of a motion for a new trial and rely primarily upon *Dahlberg* v. *People*, 225 Ill. 485 which is not parallel to the case at bar in this particular. We respectfully submit this contention, as well as the affidavit of Julius Glasser is without merit. At common law castration constituted mayhem (1 Hawkins Pleas of Crown, 175; 4 Blackstone's Com. 205). Under the Illinois Mayhem Statute, it has been held the testicles are members of the body, to maim or disable which constitutes mayhem. (*People* v. *Sailor*, 319 Ill. 205.) Under similar statutes other jurisdictions have held the same. (*State* v. *Sheldon*, 54 Mont. 189; 169 Pac. 37; *Cole* v. *State*, 62 Tex. Crim. 270; 138 S. W. 109; *Coate* v. *Commonwealth*, 176 Ky. 427; 195 S. W. 1080.) It being the law that to disable the testicles of a person constitutes mayhem, an assault with intent to so disable the same would constitute an attempt within Paragraph 58 of the Criminal Code.

We further respectfully submit the question of whether a person kicked in the testicles could be maimed was a question of fact strictly for the jury to determine. The jury heard the testimony of Dr. Chval but did not hear the ridiculous opinion of Julius Glasser.

Following petitioners' argument that disablement of the testicles could not be accomplished by the acts alleged, it is suggested that the petitioners could not have had in mind the specific intent required. This contention, we respectfully submit, is again without merit. Every person is presumed to know the natural consequences of his acts.

In *Crosby* v. *People*, 137 Ill. 325, the court said:

> "It is not necessary to a conviction, however, that an express intention need be proved. Every sane man is presumed to intent the natural consequences of his act, and it has been uniformly held, therefore, that the intention may be inferred from the acts of the person charged with crime as well as by words or declarations."

The charge is an assault to disable with intent to maim. Accomplishment of mayhem is not necessary. The assault charged is the crime. The means alleged was threatening the complaining witness with a gun and kicking him. The means used to disable is immaterial if effective. (*U. S.* v. *Scroggins*, Fed. case No. 16243; *Carpenter* v. *People*, 31 Col. 284; 72 Pac. 1072; *Neblett* v. *State*, 47 Tex Crim. 573; 85 S. W. 813.)

B.

The counts in the indictment were properly joined and no incompetent or prejudicial testimony was introduced into evidence.

Under this point the petitioners state the trial court permitted the prosecutor to proceed to trial upon numerous improperly joined counts and allowed the State to introduce incompetent evidence, thereby depriving them of due process of law, but they do not point out or suggest in what manner the counts of the indictment were improperly joined or where incompetent evidence was introduced.

We respectfully submit the indictment and each and every count is in the language of the Statute and relate to the one transaction and each count is laid under a *videlicit*, which clearly and distinctly describes the manner in which the crime was committed and is definitely sufficient for the petitioners to understand the acts they were charged with and to defend the same. It is scarcely possible to allege the facts more specifically without unduly and unnecessarily enlarging upon them.

We further respectfully submit an examination of the record will disclose that no prejudicial evidence was introduced.

MIX-UP AS TO STATUTES

The petitioners' endeavor, at this point, to confuse the issue by injecting immaterial and unnecessary matters into the argument, does not merit a reply.

The Statute provided for "an assault with an intent to commit mayhem"; the indictment so charged; the facts so proved; and the verdict so read. The punishment was provided by Statute and the verdict complied with the Statute. Whether it be a felony or a misdemeanor, and the amount of the punishment prescribed by the statute, is a matter for the Legislature, which does not concern the judiciary.

CONCLUSION

In conclusion, we sincerely urge the petitioners were proven guilty beyond a reasonable doubt by overwhelming evidence of the crime as charged in the fourth count of the indictment. They were charged with the crime of assault to commit mayhem and whether there was a labor dispute is of no consequence and absolutely immaterial.

The petitioners were not deprived of any of their constitutional rights. The proof is clear and the record, we respectfully submit, is free from any prejudicial errors.

For the reasons above given, it is respectfully submitted that the Writ of Certiorari should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Counsel for Respondent.

THOMAS J. COURTNEY,
State's Attorney of Cook County, Illinois,
Of Counsel.